Supreme Court, U.S.
FILED

No. 93 1674 APR 22 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF THE NEW YORK and JOHN BORDEN,

Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Second Circuit failed to follow the standards enunciated by this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) regarding sexual harassment in the workplace?

II. Whether an employer is absolutely liable pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, for a "hostile environment" that allegedly arose from a supervisor's conduct, where the employer has a policy specifically against sexual harassment and effective procedures available to complainants that provide prompt, remedial action?

III. Whether an employer is absolutely liable pursuant to Title VII under a "*quid pro quo*" theory where an employee, who did not suffer any job or economic detriment and received every promotion and raise based on merit, alleges submission to a supervisor's sexual advances notwithstanding the admitted existence of the employer's express policy against sexual harassment and procedures available that resulted in prompt, remedial action?

IV. Whether an employer's express policy against sexual harassment and effective available procedures are factors to be considered in determining employer liability pursuant to Title VII for a supervisor's alleged sexual harassment?

LIST OF PARTIES

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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THE TRUSTEES OF COLUMBIA UNIVERSITY
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SHARON KARIBIAN and MARK URBAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Trustees of Columbia University in The City of New York ("Columbia University" or the "University"), petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188.

OPINIONS BELOW

The Opinion of the District Court for the Southern District of New York dated February 2, 1993 in 91 CV 3135 (TPG) (Griesa, J.), awarding summary judgment to Columbia University on respondent

Sharon Karibian's sexual harassment claims pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, is reported at 812 F. Supp. 413 (S.D.N.Y. 1993) and is reproduced in the Appendix filed herewith ("App.") at A17.

The Opinion and Judgment of the Court of Appeals filed on January 25, 1994, No. 93-7188 (Mahoney, J. and McLaughlin, J., of the United States Court of Appeals for the Second Circuit, and Heaney, J., of the Eighth Circuit sitting by designation), reversing the judgment of the District Court and remanding this case, is reported at 14 F.3d 773 (2d Cir. 1994), and is reproduced at App. A1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment sought to be reviewed was entered on January 25, 1994.

STATUTES INVOLVED

Pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* (1993) ("Title VII") are reproduced at App. A29.

STATEMENT OF THE CASE

In reversing the District Court, the Court of Appeals placed the Second Circuit in conflict with this Court's prior directives in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) that (a) employers are not always absolutely liable for a supervisor's alleged sexual harassment, and (b) an employer's specific policy against sexual harassment and effective procedures to provide prompt,

remedial action are "plainly relevant". *Id.* at 72. Notwithstanding this Court's clear statement in *Vinson* that the Court of Appeals for the District of Columbia "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors" (*Id.* at 72), the Second Circuit Court of Appeals, in conflict with this Court and other Circuits, adopted a standard of absolute liability. The Court of Appeals held the employer in this case could be liable regardless of the absence of notice and the reasonableness of Columbia University's complaint procedures, based on both a hostile environment theory and a *quid pro quo* theory. Here, the employee, Sharon Karibian, claims she was compelled to submit to sexual advances by her supervisor, Mark Urban. She admits, however, that she did not suffer any economic detriment, that her raises and her promotions were on merit, and that once she made a complaint to her employer, she was promptly insulated from the alleged harasser, an investigation was commenced and the supervisor was asked to, and did, resign.

A. Facts

Respondent Sharon Karibian, while a part time adult student at Columbia University's School of General Studies, became a part time clerical worker in 1986 at the "Telefund at Columbia". This fund-raising program was under the aegis of Columbia University's Office of University Development and Alumni Relations ("UDAR"), but was designed and administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). (App. at A18) By the Fall of 1989, Karibian had progressed from clerical worker to Assistant Project Director to Project Director, the highest position at the Telefund at Columbia University. (App. at A5) Each of her raises and promotions was based solely on merit.

In the Spring of 1987, prior to respondent Mark Urban's employment by Columbia University, Karibian who was 29 years old at the time, met Urban who was 26. (App. at A18) It is

undisputed that sometime thereafter they had a sexual relationship. He claims it was welcomed and consensual; she now claims it was unwelcome.[1]

In September 1987, Urban became employed at Columbia University at UDAR. It was not until the Fall of 1989 when Karibian became Project Director of Telefund at Columbia University that Urban became her direct supervisor.

On January 30, 1990, Karibian went to the Director of Development Services at UDAR and complained that Urban was undermining her in her job as Project Director of Telefund at Columbia University since her sexual relationship with Urban had ended.[2] (App. at A20) As a result, Columbia University promptly removed Urban as Karibian's supervisor to insulate her from him, and commenced an investigation into her sexual harassment claims, during which Urban was asked to, and did, resign. (App. at A23)

Since 1981, Columbia University has maintained an effective mechanism for dealing with sexual harassment which is communicated to the University community through its "Protection Against Sexual Harassment" publication, among others. This mechanism includes Columbia University's express Policy Against Sexual Harassment which contains the unequivocal declaration that "the University prohibits sexual harassment of any member of the Columbia community." (App. at A18) The University's procedures are also clearly set forth and describe the various avenues

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[1] In the District Court and Court of Appeals, Columbia University's motion for summary judgment was based on the undisputed facts and Karibian's own deposition testimony. In each of those courts and herein, Columbia University continues to reserve its rights to contest the "facts" as alleged by Karibian.

[2] She did not tell this UDAR representative any details of her relationship with Urban and never mentioned any allegations of violence.

available to the University community if a person believes he or she is being sexually harassed. The procedures include counseling, mediation, investigation and formal grievance procedures. Members of the University can select the type of procedures best suited to their needs. These services are available through (1) any one of the twenty-six members of the University's Panel on Sexual Harassment (a "Panel Member"), (2) the Office of Equal Opportunity and Affirmative Action ("EOAA Office"), or (3) by utilizing University grievance procedures. (App. at A18-19) Communications with a Panel Member or the EOAA Office are kept confidential unless confidentiality is waived by the complainant. (App. at A19)

Karibian does not contest that the Policy and procedures exist. She also admits that she utilized confidential procedures in 1988, and she admits that when she voiced her complaint and waived confidentiality in 1990, Columbia University promptly insulated her, investigated the situation and obtained Urban's resignation.

B. Proceedings Below

In 1990, Karibian filed suit against Columbia University, John Borden[3] and Mark Urban, amending her complaint in 1991 to invoke Title VII on which jurisdiction of the District Court and Court of Appeals was based. After discovery, in June 1992, the University moved for summary judgment.

The District Court reviewed the deposition transcripts and undisputed facts, and awarded summary judgment in favor of Columbia University on Karibian's Title VII claims. That court recognized that a Title VII sexual harassment claim could be based

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[3] Beginning in April 1988, John Borden became Urban's supervisor when Borden joined Columbia University as Deputy Vice President of UDAR.

on theories of "*quid pro quo*" or "hostile environment". (App. at A20)

The District Court held that in order to prevail on a *quid pro quo* theory, a plaintiff must show an actual — rather than threatened — economic loss because a sexual advance was made and rejected. The District Court found that Karibian was not denied any economic benefit, but rather, enjoyed promotions and raises. Accordingly, the District Court held she could not succeed on a *quid pro quo* theory. (App. at A20-21)

The District Court also recognized that this Court has not established a definitive rule for employer liability regarding a "hostile environment" claim. Rather, as the District Court noted, lower courts were directed to draw from traditional agency principles, whereby a plaintiff must prove "the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." (App. at A21) Upon reviewing the undisputed evidence, the District Court concluded that "[t]here is no basis for any contention that Columbia University failed to provide a reasonable avenue for making complaints" (App. at A21) and the first time Karibian made such a complaint in 1990, Columbia University took "prompt and effective remedial action." (App. at A23)

The Court of Appeals reversed the judgment below and ordered the case remanded for further proceedings. (App. at A16) That Court held that where a complainant "submits" to a supervisor's alleged sexual advances, an employer is strictly liable for the supervisor's conduct where (a) the supervisor makes implicit threats, even if such threats are not carried out and are against the employer's stated policy, and/or (b) the supervisor uses the employee's acceptance of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job. (App. at A10) Thus, the Court of Appeals abrogated the requirement, as uniformly articulated by other

Circuits in "refusal" cases, that a plaintiff prove an economic or job related loss before an employer will be held strictly liable.

The Court of Appeals also held that Columbia University could be absolutely liable for the supervisor's alleged conduct on a "hostile environment" theory regardless of "the absence of notice or the reasonableness of Columbia's complaint procedures." (App. at A14) Thus, in conflict with this Court and every other Circuit Court to address "hostile environment", the Second Circuit Court of Appeals disregarded Columbia University's policy and effective procedures, and found that Columbia University could be held liable for a "hostile environment" allegedly arising from a supervisor's conduct.

REASONS FOR ALLOWING THE WRIT

This case involves important issues of federal employment discrimination law that should be settled by this Court. Central to this case is the legal standard of employer liability for alleged supervisor harassment and the role of an employer's specific policy against sexual harassment and procedures for prevention and prompt remedial action. The Second Circuit Court of Appeals cast aside the employer's policy and procedures, and ignored this Court's prior admonition in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), against holding an employer absolutely liable for supervisor conduct. By adopting this absolute standard for both hostile environment claims and *quid pro quo* claims, the Court of Appeals placed the Second Circuit in conflict with this Court and the other Circuits.

The Court of Appeals decision will have wide impact, and the issues raised herein will affect employees and employers throughout the nation. As people at all levels in the workplace struggle to find the correct balance between prevention and remedial action concerning claims of sexual harassment on the one hand, and

interference with individuals' purely personal relationships on the other, it is imperative that employees and employers understand their rights and obligations under Title VII and the role of effective policy and procedures concerning sexual harassment. In addition, the issues herein can be expected to continue to arise frequently throughout the federal court system.

I

THE COURT OF APPEALS DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

This Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), held that employers are not always absolutely liable for alleged supervisor harassment, and recognized that an employer's policy and effective procedures (as well as an employee's failure to invoke them) are "plainly relevant". *Vinson*, 477 U.S. at 72. In that case, this Court acknowledged Congress' intent to "place some limits" on employer liability under Title VII for acts of supervisors and employees. *Id.*

The facts in *Vinson* and this case are strikingly similar. For example, in *Vinson*, as here, the employee had received all raises and promotions on merit (*Vinson*, 477 U.S. at 60; *Karibian*, App. at A20-21); and there, as here, an employee claimed she submitted to her supervisor's alleged sexual advances out of fear of losing her job. (*Vinson*, 477 U.S. at 60; *Karibian*, App. at A5, A10.)

A significant difference between this case and *Vinson* is that here, unlike the employer in *Vinson*, Columbia University had a specific policy against sexual harassment and effective procedures that resulted in prompt remedial action.[4] The Court of Appeals,

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[4] In *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), this Court was again

however, ignored the role of this policy and procedures, and created a standard of absolute employer liability for alleged supervisor conduct in hostile environment claims. This holding places the Second Circuit in conflict with this Court's holding in *Vinson*.

The Court of Appeals' holding concerning Karibian's *quid pro quo* claim is also contrary to *Vinson*. That case, like this one, was a submission case in which the employee obtained all raises and promotions on merit. Accordingly, the courts, the Equal Employment Opportunity Commission and the litigants did not view *Vinson* as a *quid pro quo* case. In this case, the District Court, like the courts in *Vinson*, treated Karibian's claim as a hostile environment one rather than a *quid pro quo* claim. Nonetheless, the Court of Appeals, contrary to *Vinson*, found that Karibian could state a *quid pro quo* claim even though she did not suffer any economic detriment and all raises and promotions were on merit.

The Court of Appeals also ignored agency principles. Where, as here, there is no evidence that the supervisor used any actual authority to accomplish the alleged harassment, the only basis to hold an employer liable would be apparent authority. Yet, it is well recognized that "an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure." Equal Employment Opportunity Commission ("EEOC") Policy Guidance on Current Sexual Harassment Issues, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (Mar. 19, 1990) (hereinafter "EEOC

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presented with a situation where, unlike here, the employer lacked effective procedures. In that case, this Court noted that for hostile environment claims, there is not a "mathematically precise test." *Id.* at 371. Rather, liability can be determined "only by looking at all the circumstances" and relevant factors. *Id.*

Policy").[5] In short, there is a role for an employer's policy and procedures, and employer liability is not absolute.

Thus, in this case, the Court of Appeals for the Second Circuit has done exactly what the Court of Appeals for the District of Columbia Circuit had done in *Vinson*, which led this Court to conclude that "the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Vinson*, 477 U.S. at 73. As a result, the Court of Appeals in this case has placed the Second Circuit in conflict with this Court.

II

THERE IS A CONFLICT IN THE CIRCUITS

A. Hostile Environment

By adopting a legal standard of absolute liability, the Court of Appeals has also placed the Second Circuit in conflict with all of the other Circuits that have considered hostile environment claims. Each of the other Circuits has looked to whether the employer knew or should have known of the alleged harassment, and whether the employer had a policy and effective procedures designed to allow for prompt, remedial action. *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v.*

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[5] "If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship...". EEOC Policy, 8 Fair Empl. Prac. Manual (BNA) 405:6697-98.

Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).[6]

Each of the other Circuits has considered an employer's procedures and prompt remedial action, or lack thereof, as relevant factors in determining employer liability. For example, in *Steele*, while the supervisor/harasser was held liable for damages for hostile environment harassment, the Eleventh Circuit reviewed the prompt remedial action taken by the employer and affirmed the District Court's holding that the employer was not liable. *Steele*, 867 F.2d at 1316-17. *See also Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (summary judgment for employer affirmed where employer's prompt remedial action stopped the offensive conduct by a supervisor), and *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13 (5th Cir. 1994) (to hold a company liable after taking prompt remedial action "would produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment."). Similarly, in *Sparks v. Pilot Freight Carriers, Inc.*, 830 F. 2d 1554 (11th Cir. 1987), which involved both hostile environment and *quid pro quo* claims, that Court of Appeals acknowledged this Court's guidance in *Vinson* that an employer could shield itself from Title VII liability through policy and procedures that divest a supervisor of actual or apparent authority. In *Sparks*, however, that employer had "proffered no evidence that it had either a policy against sexual harassment or an effective grievance procedure." *Id.* at 1560.

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[6] Prior to the panel's decision in this case, decisions of the Second Circuit appeared to be in accord with this standard. *See Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989).

In short, each of the other Circuits, whether in a supervisor or co-employee case, has followed this Court's admonition against absolute liability. In determining whether an employer could be held liable in addition to the alleged harasser, each of those courts considered whether the employer had a policy and effective procedures. In contrast, by holding that an employer could be found liable for a hostile environment claim "regardless of the absence of notice or the reasonableness of Columbia's complaint procedures" (App. at A14), the Court of Appeals put the Second Circuit in conflict with other Circuits.

B. *Quid Pro Quo*

The Court of Appeals also put the Second Circuit in conflict with other Circuits regarding analysis of *quid pro quo* claims. An employer's policy and procedures and agency principles are also relevant in *quid pro quo* cases as shown by decisions of other Circuits. In those cases in which an employer was held liable, the employer lacked effective procedures, and the employee suffered economic detriment in refusing a supervisor's sexual advances. Thus, the supervisor exercised actual authority in taking away a tangible job benefit. *See, e.g., Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (where the President was the supervisor/harasser to whom the employee would have to complain, thus demonstrating the lack of effective procedures); and *Jones v. Wesco Invs. Inc.*, 846 F.2d 1154 (8th Cir. 1988) (a constructive discharge case where the President was the actual harasser, and effective procedures were clearly lacking). *See also Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (lack of effective procedures resulted in discharge of medical resident).

In typical "refusal" cases, an employee is deprived of an economic job benefit for refusing a supervisor's sexual advances. A strict liability standard evolved in "refusal" cases because the employer gave the supervisor the actual authority to deprive the

employee of an economic benefit. Thus, agency principles appropriately put the loss on the employer.

Absent economic loss, however, the reason for the rule of strict liability disappears. Rather, agency principles govern, whether the case is one for hostile environment, *quid pro quo*, or both. In applying agency principles to determine whether a supervisor exercised actual or apparent authority, all relevant factors must be considered, including whether the employer had a policy and procedures, and whether prompt remedial action was taken by the employer. Where, as here, an employer has an express policy against sexual harassment and procedures to promptly remedy complaints, the employer effectively divests the supervisor of any apparent authority.

This case, like *Vinson*, is a submission case. In a "submission" case, *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205 (D.R.I. 1991), the court did not use an absolute liability standard, but rather looked at all relevant factors. That court stated that the "availability and practical viability of an employer's grievance procedure" is "an important factor". *Id.* at 1211. In *Showalter*, as in *Vinson*, the employee handbook required the employee to consult his or her supervisor, who in each case was the alleged harasser. Moreover, the employer failed "to have a policy or readily accessible personnel available to handle sexual harassment complaints." *Id.* at 1212. Accordingly, the *Showalter* court, upon review of all relevant factors, enjoined future sexual harassment and directed the employer to designate an officer to receive and process sexual harassment complaints.[7] In short, effective policy and procedures are "plainly relevant".

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[7] By contrast, Columbia University's procedures designate over thirty officers to whom complainants can go regarding sexual harassment.

Thus, the Court of Appeals in this case ignored agency principles and adopted a legal standard of absolute liability, thereby placing the Second Circuit in conflict with this Court and other Circuits.

III

THIS CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING SEXUAL HARASSMENT IN THE WORKPLACE THAT SHOULD BE RESOLVED BY THIS COURT

A primary purpose of Title VII insofar as it relates to sexual harassment in the workplace is prevention and prompt action to remedy complaints by those who claim that they are victims. *See* EEOC Policy, 8 Fair Empl. Prac. Manual (BNA) 405:6699. To that end, where an employer has a specific policy and procedures concerning sexual harassment, several purposes are served. The policy makes clear that the employer will not tolerate sexual harassment. Moreover, the procedures empower the employee to protect himself or herself in the event a supervisor or co-worker ignores the stated policy. By utilizing the procedures that, as here, result in prompt remedial action, the employee need not be a victim. Rather, utilization of the procedures can serve the preventative purpose of Title VII. Such policy and procedures effectuate the obligations of and protections to both employees and employers under Title VII. By allowing courts to consider, in determining employer liability, the existence of such procedures, and whether the employee utilized them, employers have an incentive to institute effective procedures and employees are encouraged to use them. By ignoring an employer's policy and procedures, and creating a standard of absolute liability, these incentives evaporate.

Moreover, often there is a fine line between purely private relationships between individuals in the workplace and sexual

harassment. Absolute liability standards may leave employers no choice but to attempt to prohibit any relationships in the workplace.[8]

This was not the intent of Title VII, and it could be argued that it would be inappropriate for an employer to meddle in a purely private relationship between two employees even if one is a supervisor.[9] As the EEOC noted in its brief to this Court in *Vinson*, "sexual attraction is a fact of life in the workplace." (Brief of the United States Department of Justice and Equal Employment Opportunity Commission as Amici Curiae, *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) at 13.) The EEOC has previously cautioned courts to refrain from unfairly subjecting employers to liability for an ill-defined class of activities and from intruding improperly and unnecessarily upon the privacy of individuals involved in social relationships. *Id.* at 16. In *Vinson*, the EEOC

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[8] As previously noted by Judge Bork in a dissenting opinion joined by Justice Scalia (while a member of the United States Court of Appeals, District of Columbia), employers should not perform a police function concerning employees' private relationships. *Vinson v. Taylor*, 760 F.2d 1330, 1331 n. 3 (D.C. Cir. 1985). Justice Scalia argued that cases such as this one raise difficult and important questions of employer liability under Title VII that should be judicially considered.

[9] The Labor Law of New York (where this case originates) Section 201-d (App. A35) contains prohibitions which can prevent employers from interfering with relationships among employees. This new statute has resulted in two lawsuits where an employer attempted to enforce an anti-fraternization policy. *Allen v. Wal-Mart Stores, Inc.*, 93-CV-0685, FJS-DNH (N.D.N.Y. filed May 26, 1993), and *State of New York v. Wal-Mart Stores, Inc.*, 80737/93 (Sup. Ct. Fulton Co., N.Y. April 5, 1994). New York's Attorney General has taken the position that relationships between supervisors and subordinates are protected from employer interference under this statute. Randall Samborn, *Love Becomes A Labor Law Issue*, Nat'l L.J., Feb. 14, 1994, at 1, 33.

argued that a rule of strict liability would create an incentive for employers to monitor or police employee relationships. *Id.* at 26.[10]

Rather than imposing an absolute liability standard on employers for supervisor conduct, a case by case analysis of whether an employer should be liable for alleged supervisor harassment promotes the purposes of Title VII. Such analysis, of course, includes many factors, among which are the employer's policy and procedures and whether the complainant took advantage of their availability. This analysis, which is based on agency principles, is applicable to both hostile environment claims and *quid pro quo* claims in "submission" cases, and effectuates this Court's reasoning in *Vinson* and the goals of Title VII.

Where an employer does *not* have a policy against sexual harassment or procedures available to prevent and/or promptly remedy it, an employee confronted with implicit threats by a supervisor may feel compelled to submit to supervisor sexual advances. In such a situation, the supervisor may be said to have apparent authority to carry out those implicit threats and a basis for employer liability may exist.

In contrast, where as in this case, the employer has a policy against sexual harassment and there are effective procedures available, the employer may divest a supervisor of apparent authority to carry out the implicit threats. In such a situation, there is no reason for an employee to submit to alleged unwelcomed sexual advances of a supervisor. Rather, the employee has the

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[10] It should be noted that the EEOC submitted a Brief as Amicus Curiae to the Court of Appeals in this case, in which the EEOC assumed that Urban had used his delegated authority to harass Karibian and thus argued that employer liability should be absolute. The National Women's Law Center and the ACLU submitted a brief Amici Curiae in the Court of Appeals taking the same view as the EEOC.

power to protect himself or herself by using the available procedures.

Thus, employer liability in a "submission" case (which does not involve any economic loss) should not be absolute. This is particularly so where, as here, the employee chose when to use available procedures and which procedures to utilize at any particular time during the alleged relationship.

Absent a rule of strict liability in such "submission" cases, district courts can review all relevant factors, whether the situations involve co-employees or supervisors and subordinates, and there will be responsibilities and benefits to employees and employers. By encouraging employees not to "submit" but rather to utilize available procedures, employees will be better protected. Similarly, employers will be encouraged to take the necessary steps to prevent sexual harassment.

CONCLUSION

There are special and important reasons for this Court to grant a Writ of Certiorari. This case raises important questions of federal law regarding the role of employers' sexual harassment policies and procedures, the respective duties of employers and employees concerning supervisor-subordinate relationships, and whether an absolute standard of strict liability undermines the purposes of Title VII and detracts from the protections currently contemplated in the workplace.

By ignoring the directives of this Court in *Vinson* and adopting a standard for employers of absolute liability as a matter of law for supervisor conduct in submission cases, whether hostile environment or *quid pro quo*, the Court of Appeals placed the Second Circuit in conflict with this Court and other Circuits. The conflict with this Court and the unsettled state of the law among the Circuits, the importance of the issues presented by this case, the

impact of those issues on employment relations, and the significance of employment discrimination claims to the business of the federal courts, all warrant consideration of the case by this Court.

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: New York, New York
April 22, 1994